IN THE SUPREME COURT OF FLORIDA

BAKER COUNTY PRESS, INC.
and JAMES C. MCGAULEY,

Petitioners,

vs.

BAKER COUNTY MEDICAL
SERVICES, INC.

Respondent.

Case No.: SC04-894

L.T. Case No.: 1D03-803

PETITIONERS' JURISDICTIONAL BRIEF

On Review from the First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

For jurisdictional purposes, Petitioners rely on the facts stated by the First District. *See Baker County Press, Inc., et al. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA, March 4, 2004). Baker County Press and McGauley, the Petitioners here and the Plaintiffs and Appellants below, sued Baker County Medical Services, Inc. ("BCMS") for access to its records and meetings pursuant to §286.011, Fla. Stat. (2002) (the "Sunshine Law"), Chapter 119, Fla. Stat. (2002) (the "Public Records Act") and Article I, § 24 of the Florida Constitution (the "Sunshine Amendment").[1] BCMS is a private lessee that operates a public hospital in Baker County.

Baker County Press and McGauley argued that BCMS is subject to the open government laws pursuant to this Court's decision in *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373 (Fla. 1999) ("*Memorial I*"). They further argued that exemptions to the open government laws in §155.40(6) & (7), Fla. Stat. (2002), and §395.3036, Fla. Stat. (2002), are unconstitutional since they fail to comply with the Sunshine Amendment. BCMS took the position that it is not subject to the open government laws based on a 1994 trial court judgment to that effect, and based on the exemptions in §155.40(6) & (7) and §395.3036. The trial court refused to apply *Memorial I* to this case and held that its final judgment

[1] The Sunshine Law, Public Records Act and Sunshine Amendment are referred to herein as the "open government laws."

in 1994 that BCMS is not subject to the open government laws was res judicata. The trial court also held McGauley has no standing. The First District held that the trial court erred in applying its 1994 final judgment, and that BCMS is subject to the open government laws pursuant to *Memorial I*. The First District also agreed with Petitioners that the §155.40 exemption is unconstitutional.

However, the First District affirmed the judgment against Petitioners based on its determination that the §395.3036 exemption is constitutional. The First District also affirmed the judgment that McGauley has no standing. The First District's decision is dated March 4, 2004, and Petitioners' motion for rehearing was denied on April 22, 2004. This review follows.

SUMMARY OF ARGUMENT

This Court has jurisdiction because the First District's decision expressly declares valid a state statute. In addition, this Court has jurisdiction because the First District expressly construed Art. I, § 24, Fla. Const. This Court also has jurisdiction since the decision below expressly and directly conflicts with this Court's decisions in *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999), and *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) ("*Memorial II")*. Finally, the First District's affirmance of the judgment against McGauley based on standing conflicts with this Court's decision in *Board of Public Instruction of Broward Co.*

v. Doran, 224 So. 2d 693 (Fla. 1969), and the Second District's decision in *Godheim v. City of Tampa*, 426 So. 2d 1024 (Fla. 2d DCA 1983).

ARGUMENT

I. This Court Has Jurisdiction Because the First District Expressly Declared Valid a State Statute Which Creates an Unlawful Entity Exemption From the Open Government Laws

This Court has jurisdiction to review the First District's determination that §395.3036, Fla. Stat. is constitutional. Art. V, §3(b)(3), Fla. Const. This Court should grant review to determine whether §395.3036 is constitutional.

Section 395.3036 creates a new entity in Florida; an entity which is subject to the open government laws by virtue of performing a governmental function, but which is exempt with respect to all of its records and meetings, regardless of their subject matter or content. The decision below upholding this entity exemption threatens the core values of open, transparent and accountable government that this Court has long protected and which Floridians guaranteed to themselves in the Sunshine Amendment. An entity exemption is a frontal assault on the Sunshine Amendment. Instead of being narrowly tailored as constitutionally required, an entity exemption of all records and all meetings could not be more broad.

The Legislature has enacted three exemptions applying to private lessees of public hospitals: §155.40(6) & (7), which the First District held unconstitutional; §395.3036, which the First District held constitutional, and; §395.3035, as

amended after this Court held §395.3035(4) (1995) unconstitutional in *Halifax*. After *Halifax*, the Legislature enacted Chapter 99-346, Laws of Florida, to amend §395.3035. Chapter 99-346 sets forth a specific public necessity for exempting specified records and meetings of public hospitals concerning strategic plans. It specifically defines what is a strategic plan, and what is not, and narrowly tailors the exemption to the stated necessity. Chapter 99-346 also amended §395.3035 to include private lessees of public hospitals within its purview. The statement of public necessity in Section 2 of Chapter 99-346 confirms that privately operated public hospitals are exempt from the open government laws in the same manner and to the same extent as publicly operated hospitals.

Section 395.3035, Fla. Stat. (2002) exempts narrowly defined records and meetings and sets a procedure for closing meetings. It requires closed meetings to be recorded and the transcripts to be released in a defined timeframe. It requires certain records to be public, such as materials submitted in connection with the hospital's budget and records describing the existing operations of the hospital. On the other hand, §395.3036 exempts everything. The existence of §395.3035 lays bare the constitutional infirmities of §395.3036. The fact that §395.3035 exempts specific records and meetings of private lessees and requires all other records and meetings to be open belies any notion that there is a public necessity for private lessees of public hospitals to become the first and only public functionaries to be

completely exempted from the open government laws.

This Court has been urged twice in the past to address the constitutionality of §395.3036, but review was unavailable for procedural and jurisdictional reasons. The Legislature passed §395.3036 while *Memorial I* was pending in this Court. This Court requested the parties to brief the issue of whether it could rule on the constitutionality of §395.3036 at that time. After considering the issue, this Court remanded the case to the trial court for an initial determination of constitutionality of §395.3036. The trial court ruled that §395.3036 is unconstitutional. See, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 2002 WL 390687 (Fla. 7th Cir. Ct., 2002) ("*Memorial III*"). The private lessee in *Memorial III* did not appeal the ruling that §395.3036 is unconstitutional. Petitioners submit that *Memorial III* is the correct constitutional analysis of §395.3036.

In addition, the private lessee of Tampa General Hospital urged this Court to take jurisdiction of an appeal of a Second District decision affirming a trial court judgment which held, among other things, that §395.3036 is unconstitutional. See, *Florida Health Sciences Center, Inc. v. The Tribune Company*, (Fla. 13th Cir. Ct., October 22, 1999), *aff'd., Florida Health Sciences Center, Inc. v. The Tribune Company*, 785 So. 2d 481 (Fla. 2d DCA 2001), *rev. dism., Florida Health Sciences Center, Inc. v. The Tribune Company*, 790 So. 2d 1103 (Fla. 2001) ("*Tampa General*"). This Court did not have jurisdiction to review *Tampa General* since

the Second District affirmed the final judgment *per curiam*, without opinion. See Order dismissing review, dated May 3, 2001, SC01-859. In this case, however, the constitutionality of §395.3036 is properly before this Court.

II. The First District's Decision Expressly Construes Art. I, § 24 of the Florida Constitution

The decision below expressly construed the Sunshine Amendment by holding that exemptions passed pursuant to it are presumed constitutional, and that §395.3036 meets the Sunshine Amendment requirements that exemptions be narrowly tailored to a specified public necessity. This Court has jurisdiction to review the First District's construction of the Sunshine Amendment. Art. V, § 3(b)(3), Fla. Const. This Court should exercise its discretion and review the decision below since it undermines and conflicts with this Court's construction of the Sunshine Amendment in *Halifax*, as set forth in the next section.

III. The First District's Decision Conflicts with this Court's Decision in *Halifax*

Burden of Proof. The First District erred in placing upon Petitioners the burden to prove beyond a reasonable doubt that § 395.3036 is unconstitutional. The Florida Constitution's declaration of rights reserves to the people a self-executing right of access to public records and meetings and strictly limits the Legislature's power to override that right. Art. I, § 24, Fla.

Const. The right of access to governmental meetings and records is a fundamental right since it was included in the Declaration of Rights in the Constitution. *See, e.g., Traylor v. State*, 596 So. 2d 964 (Fla. 1992); *Mitchell v. Moore*, 786 So. 2d 521 (Fla. 2001). Since the right of access is a fundamental right, the burden shifts to the state to establish the constitutionality of exemptions. See, *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), citing *Winfield v. Division of Para-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985).

This Court in *Halifax* did not place the burden of proof on the media to establish beyond a reasonable doubt that the exemption in §395.3035(4) was unconstitutional. On the contrary, this Court measured the breadth of the exemption against the scope of the justification, applied the textual standard of the Sunshine Amendment, and struck down the exemption. This Court stated that "the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose." *Halifax*, 724 So. 2d at 570. The First District's holding that Petitioners have the burden to prove beyond a reasonable doubt that the exemption is unconstitutional conflicts with *Halifax*. This Court should quash this deviation, restore its *Halifax* precedent, and review §395.3036 against the plain constitutional text.

<u>Application of Exacting Constitutional Standard</u>. In *Halifax*, this Court

analyzed the substance of the Legislature's statement of public necessity and measured the statement of necessity against the breadth of the exemption. This Court found the exemption unconstitutional since the exemption for records and meetings concerning strategic plans was broader than the specified public necessity of protecting critical confidential information.

In the instant case, there is nothing in the statement of public necessity to justify exemption of all records and all meetings. The statement of public necessity is quoted in full in the First District's decision. The statement is a patchwork of references to past reliance on lessees' perceptions of state of law, competition and capital attraction. In the end, however, the only necessity actually defined is in subsection (3), which states that it is a public necessity to clarify when the open government laws apply to private lessees. The statute justifies drawing a line, but without justifying where the line is drawn. The Sunshine Amendment and *Halifax* require more.

Pursuant to *Halifax*, an exemption must articulate a specific statement of a public necessity justifying an exemption. The exemption in this case does not explain why the public hospitals of the State should be granted a blanket exemption conditioned only on delegation of their public function to private lessees, and it does not explain why public hospital lessees who are supported by public funds cannot continue to operate unless every meeting they have

and every document they create is kept secret. The stated necessity is clarity, but clarity is not a justification for closure. Clarity is achieved in §395.3035 without exempting an entire entity or agency.

IV. The First District's Decision Conflicts With this Court's Decision in *Memorial II*

The First District's decision expressly and directly conflicts with *Memorial II*. Following this Court's decision in *Memorial I*, this Court remanded that case to the Circuit Court, which issued an order requiring production of the private lessee's records created prior to May 30, 1998, the effective date of §395.3036. The hospital lessee appealed and the Fifth District affirmed, but certified the question to this Court. In *Memorial II*, this Court held that §395.3036 is not retroactive and that the hospital lessee was required to produce its records existing prior to the enactment of §395.3036.

The First District held below that BCMS is subject to the open government laws, but affirmed the judgment denying access to all records, including those preexisting §395.3036. Such holding is directly contrary to *Memorial II*. The First District did not explain why it did not follow *Memorial II*, but it may have determined that the older records were not of enough value to warrant enforcement of Petitioners' rights of access. However, 1998 was an eventful year for BCMS including its receipt of $11 million in public bond funds to demolish the old hospital and build a new one. Also, while post-

1998 records and future meetings are obviously of much greater interest to Petitioners, Petitioners suggest that *Memorial II* is still Florida law and the First District should have followed it.

V. The First District's Decision Conflicts With this Court's Decision in *Doran* and the Second District's Decision in *Godheim*

The First District affirmed the trial court's partial summary judgment against McGauley, holding he has no standing. The basis of the judgment against McGauley was the trial court's conclusion that the public records request to BCMS was made by the *Baker County Press*, not McGauley individually.

Regardless of who sent the public records request, McGauley had standing to seek redress for violations of the Sunshine Law. Section 286.011(2), Fla.Stat., states that "[t]he circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state". This Court, in *Doran*, 224 So. 2d at 699, confirmed that a citizen of Florida has a right to seek an injunction against an entity for violations of the Sunshine Law. In *Godheim*, 426 So. 2d at 1088, the court held that a taxpayer had standing to challenge a City contract under the Sunshine Law. The court stated that § 286.011, Fla.Stat., "on its face, gives the appellant standing without regard to whether he

suffered a special injury." *Id.* The First District's affirmance of the judgment against McGauley expressly and directly conflicts with *Doran* and *Godheim*.

CONCLUSION

This Court has discretion to grant review. Based upon the foregoing argument and authority, review should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Facsimile and U.S. Mail to John D. Buchanan, Esq., Henry, Buchanan, et

al., 117 South Gadsden Street, Post Office Box 1049, Tallahassee, Florida 32302, on this ____ day of June, 2004.

_____

_____

Attorney

CERTIFICATE OF COMPLIANCE
REGARDING TYPE SIZE AND STYLE

Petitioners certify that the text of this Jurisdictional Brief complies with the font requirements set forth in Fla. R. App. P. Rule 9.210.

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Attorney